UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
KEURING GREEN MOUNTAIN SINGLE-SERVE COFFEE ANTITRUST LITIGATION	:	Docket 1:14-md-02542-VSB-SLC
	:	New York, New York May 21, 2020
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PROCEEDINGS BEFORE
THE HONORABLE SARAH L. CAVE,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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HONORABLE SARAH L. CAVE (THE COURT): Hi, good morning. This is Magistrate Judge Cave. This is a conference in In Re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation, case number 14-md-2542.

May I have the appearances of counsel, please?

MR. MUKHI: Good morning, your Honor. This is Rahul Mukhi from Cleary Gotlieb on behalf of Keurig.

THE COURT: Good morning.

MR. KEVIN CONNEELY: Good morning, your Honor. This is Kevin Conneely for non-party Microtrace.

THE COURT: Good morning.

MR. FREDERICK ISQUITH: Good morning, your Honor. This is Fred Isquith from Wolf Haldenstein for the indirects.

THE COURT: Okay. Good morning.

MR. ISQUITH: Good morning.

THE COURT: Anyone else who'll be speaking? There may be others listening, but if there's anyone else who will be speaking?

All right. Then we're here this morning on the motion to quash the subpoenas to Microtrace that was transferred to me by Judge Bowbeer. And so I have read all of the parties' papers as well as the transcript of the argument in front of Judge Bowbeer but did just have a few

additional questions and was also hoping to possibly facilitate a potential compromise with respect to the subpoenas if at all possible.

So would you like to start, Mr. Conneely? And then I can jump in with my questions to the extent that you don't answer them. Like I said, I have read all the papers, so you don't need to recap everything. But if you wanted to focus on the principal arguments with respect to the -- it sounds like the overbreadth of the subpoena, the subpoena continues to be an issue.

MR. CONNEELY: Thank you, your Honor. I will make a few comments. Of course, I'm most interested in what the Court wants to hear, and so let me just make a couple of opening comments to kind of set the stage. It is Microtrace's motion, and so we want to make sure that the Court understands that Microtrace is willing to participate in a reasonable scope of discovery and has been since it received the subpoenas. However, we have to protect ourselves against both an unreasonable and burdensome scope. And as the Court knows, Rule 45(d)(3) allows the Court to quash a subpoena or part of it where it would be an undue burden if someone wishes to comply. But also under (d)(3)(A) of Rule 45, where proprietary, trade secret and confidential information's at stake, Keurig here has a

higher burden than just discoverable or potentially relevant; it has to make a showing of substantial need for the testimony or the material that can't otherwise be met without undue hardship. And I think that's important here because the Court and federal courts in general recognize the need to protect non-parties, both where they are pulled into a dispute they are not part of and which they cannot participate fully in, but also where the parties themselves can fight over, negotiate and go to court over the scope of discovery in a much more ready fashion.

And so the other thing I was going to say to set the stage is that if you looked at the transcript -- and it sounds like you did -- the flags in the ground for each respective party before Magistrate Judge Bowbeer on this motion were by Keurig what they're calling their narrowed topics that they set forth in pages 6 and 7 of their opposition brief. And I think we've made a mess of the ECF legends in this case, but it's ECF 945-7 in your Court -- and that's pages 7 and 8, ECF 945-7. And so they have three points out there.

THE COURT: Yes.

MR. CONNEELY: In contrast, we've set out our proposed order to our court here, and we still stand by that. We think that is the right balance to strike to

protect a non-party's business-critical information but at the same time allow a scope of discovery that lets Keurig know some facts about how Microtrace operated with TreeHouse.

And if I could just -- I was just going to say one more thing about their narrow topics. If I take them in reverse order, because the last one's the hardest, in reverse order they want from 2003 to the present, all costs --

THE COURT: Is that 13, I think?

MR. CONNEELY: 2013, yes.

THE COURT: Right.

MR. CONNEELY: 2013. All costs, fees and profits for the work that Microtrace did for TreeHouse. Well, the fees is undisputed; it's been undisputed. TreeHouse doesn't object to us providing the invoices and the payment records. And we've given Keurig a summary of every payment from 2013 through 2017. So as far as what TreeHouse had to pay in order to meet the challenge of the lockout, undisputed and resolved. What is in dispute, though, is our internal accounting, our internal margins and costs, which are not relevant. Even if you take Keurig at their word that they need to know if -- and I'm citing to their brief now -- let me find it here -- in their brief, ECF 945-12 -- sorry

that's from the hearing -- in their brief it's 945-1, sorry, at page 50, and they keep framing the question as though it's could TreeHouse have more economically addressed the lockout, the alleged lockout; could TreeHouse have done it and spent less money or found some less expensive alternative. Well, that's all fine, but you don't think ask what Microtrace's margins were, just as if the Court's quite familiar, I'm sure, with attorney's fees awards. And when the parties come in and they say, "Well, our lawyers charged us $500 an hour or $250," the Court doesn't say, "Well, I'm going to check and see if that's a reasonable rate," by looking into that firm's margin. What the Court does and what anybody does in economics is say, "What were the market alternatives for TreeHouse at the time it engaged Microtrace?" not, "Did Microtrace make a lot of money relative to what Keurig thinks we should have made?"

So that's the third point, which is we've given them the undisputed amounts paid, and Keurig knows that now. And if that's what TreeHouse is going to claim as their damages, then it's up to TreeHouse to defend the reasonableness of the amounts they paid. But it's not appropriate to invade a non-party's financials of a small, privately-held company, and say, "We need to know what your costs and margins were." So that's our argument on the

third point. We've complied with what we think is within the scope, reasonable scope; and that should be the end of that.

With regard to the second point, we've already resolved that, as well. We produced all of our communications with Sun and with Keurig over time. We've already done that. And when I say "all," Mr. Mukhi might question that; we haven't had any. We've had, like, three or five pages of documents we could find as far as Microtrace communicating with either Sun Chemical or with Keurig over time, and we've provided those, as well.

So, again in reverse order, the hardest one in what they're calling the Keurig narrow topics is still way too broad because they say we want to know everything about Microtrace's work for TreeHouse in 2013 and 2014, and we want to know all efforts by Microtrace to obtain an ink-Taggant solution. Well, I know it's a shorter sentence, but it's actually much, much broader and hard to respond to than in fact the original topics in their original subpoenas. And so, as the Court knows, we were looking for some certainty, we were looking for some way to figure out could we present a witness. And, unfortunately, the way we're looking at Keurig's narrow topics now, we believe that they haven't narrowed them at all, they've made them more vague,

they've made them more intrusive; and it would be very hard not to have a fight over whether a question in a deposition or a document request is within the scope of, quote, "work for TreeHouse or all efforts by Microtrace."

So that's the difficulty we still have. We brought this motion. We've put together a pretty detailed proposed order to the magistrate judge in Minnesota specifically so that everyone would know where we stood. And we think we've struck the right balance.

I'm happy to talk about other issues with the Court. I do want to mention Sun Chemical only if the Court has any questions about Sun Chemical. It's really not a good comparison, and the only reason that Sun Chemical, I think, matters to this case is that it's one of those market comparables that the parties and a finder of fact could look to instead of trying to invade Microtrace's internal financials.

I have other things to say, but I'd much rather hear from the Court what your concerns are or questions.

THE COURT: Yes. Focusing on the first topic, so I guess the last one that you've discussed, and trying to better define or clarify and narrow the scope of what Keurig would be asking you for, would there be -- would Microtrace be able to provide that information through a

witness at a categorical level? In other words, the work that Microtrace did involved X number of people, Y number of steps or tests, Z amount of hours, and just provide that information at a high level, obviously, under -- you know, using the confidentiality protection that we have in the case -- and I know you have some issues with that, and I'll get to that in a minute. But would that be a possible compromise for Microtrace to provide that information without getting into details that might compromise any trade secrets or proprietary information? Would that be information that Microtrace could provide at that kind of categorical high level?

MR. CONNEELY: Yes, your Honor, it is. And in fact, Mr. Broger, Microtrace's president, whose declaration is in the record, provides some of that information. And we would be willing to have him testify about how long it took, how many people were involved, but not "and here's the specific machinery and tests that we used, and here's how we employed them," because now we're getting into the secret sauce.

THE COURT: Right, right. Okay. And I'll ask Mr. Mukhi in a minute whether that would suffice from his perspective. But I just wondered if that might be a way -- if you had that kind of guidelines for purposes of

gathering whatever remaining documents there are and preparing Mr. Broger for his deposition, would that kind of instruction from the Court provide you with sufficient guidance to proceed?

MR. CONNEELY: Well, we think so, but we can't anticipate every question, of course.

THE COURT: Right, right.

MR. CONNEELY: But we think so, yes.

THE COURT: Okay. All right. And then I guess while I have you, let me ask you about -- I don't know if Kelly Jahorich is a Ms. or a Mr., but --

MR. CONNEELY: She's a "Miss," yes.

THE COURT: A Miss. Would you anticipate that she would be testifying, as well, or would it just be Mr. Broger?

MR. CONNEELY: I guess that would depend on the outcome of this, but also what level of detail Keurig needs. Because Ms. Jahorich is the person who put together the invoice and payment summary.

THE COURT: Okay, I see.

MR. CONNEELY: And if there was more needed to lay foundation for that, we could provide her. But if -- we could also just -- I don't think anyone's going to -- I don't think anyone's going to dispute this. And, by the

way, the same information exists at TreeHouse, the exact same information.

THE COURT: Right, right. The other person that I had that came up in the papers is related to the customer relationship manager server. Is that something that Microtrace was willing to produce and did produce, or is that a disputed topic, as well, or a disputed category of documents at this point?

MR. CONNEELY: Sure. Thank you. That server is a -- we call it ACT, A-C-T, inside of Microtrace. And in ACT they record interactions with customers. So where I think that came into play is we were talking with Keurig's counsel about duplicating the email production, and I said there could be information as far as communications between TreeHouse and Microtrace in ACT, and we would be willing to search that. But, of course, what we're going to search for needs to be first defined.

THE COURT: Right.

MR. CONNEELY: We aren't going to search just for our own internal ideas or thoughts that we record in ACT. We would search there for things like I called Joe Smith at TreeHouse to discuss Taggant inks or something like that.

THE COURT: Okay. Okay. So direct, essentially

recording direct communications to or from TreeHouse?

MR. CONNEELY: That's right.

THE COURT: Okay. All right. And then I think my last question for the moment is with respect to the confidentiality orders that we have in place in our case and just -- I just wanted to make sure I'm understanding what additional protections you're asking for. And it looks like the main issue seems to be getting advance notice that any of Microtrace's production or transcripts of its witnesses, that you would be given advance notice of that before it's shared with any experts, mock jurors, inhouse counsel or in the Keurig v. Sun arbitration; am I understanding that right?

MR. CONNEELY: I don't think so, your Honor. And I'm sorry if you got that impression. Microtrace objects to any disclosure of the secret way in which it reverse-engineered. And we pointed out the protective order's limitations merely because it's this Court's obligation, as you know, all federal courts, when it's a non-party, you have to weigh the potential burdens and the potential likelihood of harm to the non-party against the need and the relevance.

And I guess if I can just describe that for a little bit, Keurig really hasn't put forth an argument

about relevance, let alone a Rule 45(d) argument that you have a substantial need for what Microtrace did that can't otherwise be met without undue hardship. And so for us we're asking the Court to strike the balance in favor of protecting the non-party by saying whatever we did to, not the procedures as we were just discussing with the Court, you know, the how many people and the months and all that. That's fine. But if they start asking for information about what was the exact formulation, how did you get there, what machines did you use, that sort of thing, we think that should just be quashed and off limits.

THE COURT: Right, right. Okay.

MR. CONNEELY: Okay. Thank you.

THE COURT: Yes, yes. I wasn't sure if you were asking for additional protections with -- even within the bounds of whatever it is we negotiate or whatever compromise we may be able to reach today. You're not asking for additional protections as to that scope with respect to confidentiality?

MR. CONNEELY: With respect to the things that we've agreed to provide, that's right, your Honor.

THE COURT: Yes. Okay. Okay. All right. That's helpful. Thank you for that, for that clarification.

Okay. Mr. Mukhi, can I hear from you on the

points that I just discussed with Mr. Conneely?

MR. MUKHI: Sure.

THE COURT: And you can go in whatever order is easiest for you.

MR. MUKHI: Sure. So why don't I start with the last point that you were discussing with Mr. Conneely? We did reach out to Mr. Conneely earlier this week. Judge Bowbeer had asked if we had had discussions about any potential modifications to the protective order that would satisfy Microtrace. And we got the same answer that I think Mr. Conneely just provided, which is no, there's nothing that could practically be done to address the concerns. And, you know, that is not consistent with the law, which is there is no absolute privilege for trade secrets. Even trade secrets are similar to confidential information. And that's been ruled upon by many courts. We cited the (indiscernible) case in our briefing. The Supreme Court has held that. So then you do get to, one, what is the relevance of the information; and, two, the purported injury to the party disclosing the information. But you look at that injury that's asserted in the context of the protective order. And so here we have a very stringent protective order; we have multiple levels of classification, including outside counsel only.

And with respect to that -- and I wanted to raise your Honor's aware from motion practice over the last week, Keurig has agreed to produce its own 2.0 source code information under the protective order in this case. I understand that Microtrace is a third party, but that information that Keurig produced is at least as sensitive as Microtrace's work with respect to the 2.0. We've designated it outside counsel only under the protective order, and information's been produced. And so we think if it's sufficient for Keurig to produce its source code information under that designation, it's certainly sufficient for Microtrace to protect whatever work it was doing. And, again, we're talking about 2013 and 2014, you know, six and seven years ago, to reverse-engineer the same 2.0. So, you know, we're talking about information that -- understand the assertion of confidentiality, understand 2013 and 2014, this was sensitive; but we have a protective order, and it's now six or seven years later.

Let me describe a little bit, because Mr. Conneely made some references to information that was produced a little less than a week ago. It's 65 pages so, you know, not even 65 documents; we're talking about 65 pages. It's basically a couple of contracts, two pages of information, maybe a few more, but a handful of pages about

payments to Microtrace, and a couple of pages from the customer ACT system that Mr. Conneely referenced, which I'll get back to. And this is a step back as to what other similarly situated parties have produced and what discovery's been taken from analogous third parties on Keurig's side. So Sun Chemical, that was obviously set forth in our brief. That was Keurig's ink provider at the time of the 2.0. They produced almost 2,700 documents they got for a full-day deposition. Flint Ink, which was the ink provider Keurig used after Sun, was also subpoenaed. They produced over 2,000 documents for a deposition in February. And then more recently, Exponent, which is another outside engineering firm used by Keurig in connection with the 2.0 in technology, they were subpoenaed actually for much broader information, but it included information analogous to what we're seeking here. So this is from Exponent; this is the more recent subpoena. Some of the topics included research related to Taggant and 2.0 cups, component parts, the technology completed on behalf of KGM. Again, this is to Exponent: your work completed for or on behalf of KGM related to Project Squid; any communications concerning those topics to or from, including some chemical in Keurig. Again, they responded and produced 2,700 documents. And I believe there's a

deposition scheduled in that.

Just to compare that again, when Microtrace, I believe when they produced the information, this is what is responsive to their proposed order, which Mr. Conneely cited, it's 65 pages.

And so it's really, although Mr. Conneely had said we're willing to be reasonable and produce information, it's such a limited set of information that's being provided, it's not reasonable, in our view. And if Keurig's vendors are relevant, then in fairness and the same logic, Microtrace should have to produce.

And to go to the relevance point, this is one of the key issues in the case. TreeHouse claims they were locked out; they brought litigation on that basis; and then they were actually able to get into the 2.0. So how and when they knew they could get in, that's relevant. And just to contextualize this again, Microtrace is doing this work, including after TreeHouse brought the litigation. And so if Keurig's 2.0 source code is relevant, then the equivalent on the other side is also relevant, that how did Microtrace reverse-engineer, in their words, 2.0 compatibility. This is TreeHouse's agent that they engaged to do this, the plaintiff in this case.

And with respect to communication, you know,

you've pointed out --

THE COURT: Could I just keep you on --

MR. MUKHI: Yes.

THE COURT: -- could I just keep you on the first issue? So the suggestion that I offered to Mr. Conneely and he seemed able, it seemed like they would be able to accommodate, which was discussing what Microtrace did at a categorical level, that is how long it took, the number of people and other kind of broad descriptions of what they did, what I'm still not understanding is why that level of description is not sufficient for Keurig's purposes. In other words, the point of all of this I understand is for -- TreeHouse is going to show or Keurig will show that TreeHouse went out and had to engage an outside consultant in order to do this. The outside consultant took, you know, X number of time; it involved such a number of people; and the result was what they were able to conclude. What I don't understand is why the exact mechanism and tests and whether it was algorithms or particular scientific tests or anything like that, why does that -- why does Keurig need that?

MR. MUKHI: Well, so I think to answer, you know, whether Keurig would think that could satisfy a request is I agree with Mr. Conneely in that I think that the devil

is in the details on that because parties have obviously had disputes over scope, and, you know, in our view, Microtrace has taken, you know, exceedingly narrow views of each of our requests, as demonstrated by the 65-page production, which I believe Microtrace is saying complied with their proposed order. But on your question of why do we need it, and we discussed it with Magistrate Judge Bowbeer as an example, you know, for example, one of the claims is both part of the antitrust claims but also separate false advertising claim is that Keurig allegedly made false statements about the 2.0 technology and whether it was going to prevent competitor cups. And we pointed out this is intention with overall theory, but they've alleged it, TreeHouse and other plaintiffs. So the work that -- and, by the way, you know, the 2.0 source code, to the extent JBR and TreeHouse and the other plaintiffs are looking at that to try to build up this argument about Keurig's statements about the technology, well, what was being done on the other side with respect -- and particularly being done to reverse-engineer, hack, whatever word you use into the Keurig 2.0, well, that's going to be relevant because the lengths with which they potentially had to go to reverse-engineer the 2.0, well, we think that's potentially relevant to a defense of ours to say,

okay, you know, this is what they had to do to get in. If they had to do that, then we had a reasonable belief as to our statement. So that's, you know, an example.

And, you know, this issue, it's so central to so many claims in the case, you know, cutting it back to such a high level is going to, we think, constrain our defense in a way that's not reasonable and constrain our ability to get information that's relevant to a defense in claims being asserted against Keurig.

So, you know, we're willing to discuss anything that, of course, the Court proposes and have been willing to discuss with Microtrace for months, since January, narrowing the scope. But we've gotten to the point where, you know, we're now less than a month away from a third-party deadline, and we think we've narrowed our topics, we've made them high level, and that these are the ones that should comply with.

And I just want to turn for a second -- unless your Honor has more questions about that issue -- I was going to turn to the ACT system.

THE COURT: Please go ahead and turn to ACT.

MR. MUKHI: Okay. So your Honor saw in the correspondence we, Mr. Conneely in discussions told us about ACT. And so what we said is, you know, we are

interested in that, and it sounds like it potentially would contain responsive information. The issue of just limiting it to that is, without even seeing it, is that these systems are used in different ways, as your Honor might imagine and might have experience with. There are some companies and some individuals with companies who may log every interaction in the system. But then there are occasions when people use it in other ways where it's not really a true log. So you might, for example, in our experience, there might be companies who use that system to log, you know, pure sales calls, so not sort of ordinary-course communications once a relationship is established but pre-relationship sales calls. So we don't know how complete of a set of documents and correspondence that system might contain. It does sound relevant, but we're not confident, because we haven't seen anything, that it would necessarily be a complete set of communications. And I don't think Mr. Conneely has ever disputed that there would be internal email at Microtrace that wouldn't have been provided to TreeHouse, for example, internal analysis. I think he's actually said that there is information purely at Microtrace that never made its way over to TreeHouse. So that wouldn't be captured by the ACT system as it's been described.

And I guess just finally I would just address the cost information. This actually is -- you know, in particular, if you look at the protective order, the parties anticipated that the outside counsel designation would apply to information like that. And so it's referenced as information that would be covered by outside counsel only. And we think it's relevant. We think it's relevant to mitigation. Like I said, TreeHouse had engaged Microtrace using them during the course of the litigation. And so, you know, examples of overpayment, potentially -- and, yeah, market tests can be one factor in that, and that's a fair point that Mr. Conneely raised. But what overpayment, if any, TreeHouse made to Microtrace for the technology that they're basing their alleged damages on, we think that's relevant, and we can raise that as a mitigation defense, among other things, at trial to say, you know, they're not entitled to damages, they're not entitled to treble damages when they could have mitigated, as evidenced by the true costs of this work that they hired Microtrace to do.

THE COURT: I guess I don't understand why whether Microtrace made or lost money on this engagement for TreeHouse, how that has anything to do with the issues in this case. TreeHouse paid what it paid. If you think they

overpaid, you can try to show that; but I don't see why -- I don't see how Microtrace's internal margin analysis, that's entirely internal to Microtrace, and I'm not understanding how that has any bearing on what you have to prove or what TreeHouse has to prove.

MR. MUKHI: Well, I think it goes to the point that you just made. So we can try to show the overpayment. And having that information, we won't be able to -- if we don't have that information, then we wouldn't, for example, at trial be able to cross-examine TreeHouse's witness about the true cost of the services that they hired Microtrace to do if, you know, there's not a particular email that made its way across the transom to TreeHouse. Maybe they didn't put it in email and tell TreeHouse that this is our cost, but we should be able to test TreeHouse's reasonable belief as to whether they were paying a reasonable amount. And their claiming damages and treble damages in this case, and so we think we're entitled to the full amount of information to try to defend ourselves against that, including a mitigations defense. And, yes, we'll use other information to try to show that, but we think that this information is also relevant to a defense in the case.

THE COURT: All right, well, I disagree. I don't think that the -- Microtrace's internal cost analysis on

this work that it performed has anything to do with the issues that the parties have to prove or disprove in this case. TreeHouse paid what it paid; Keurig -- no matter what that number was, Keurig would argue that it's too much. So -- and unjustified -- so having to dig through Microtrace's internal accounting functions to figure out whether Microtrace made anything on this engagement -- I assume -- I mean, Microtrace is a commercial establishment; I assume that it made money on this project. But how much it made is really not any of the parties' business in this case.

With respect to the communications, I just wanted to ask Mr. Conneely, can you clarify for me has the production that Mr. Mukhi was referring to of the 65 documents, does that include what Microtrace has found in the course of its search for communications with Keurig and Sun so far, or have you not yet undertaken to do that search and production?

MR. CONNEELY: Thank you, your Honor. Microtrace has produced every document it could find regarding its communications with Sun Chemical and with Keurig. So we have produced everything in that category.

And I'd like to respond, but I also want to -- if the Court has other questions for Mr. Mukhi, I don't

want to interrupt.

THE COURT: No, go ahead, if you have other responses at this time.

MR. CONNEELY: So briefly, on the 65 documents, if you could comply with a subpoena by producing 3,000 documents regardless of what they were, that would be a strange test for discovery. The fact is we have a series of contracts with TreeHouse, and we provided them. We've summarized the payments and the invoices, and we provided them. We found every communication, every written communication we can find with Sun or with Keurig, and we provided them. Saying that it's only 65 documents is a fact, but it shouldn't move the Court one way or the other.

The second point I want to make about non-parties is, first of all, neither you, Judge, nor we have any way to gauge how intrusive or how trusting Sun or Flint or Exponent or any of these other people whose documents are not part of the record because there was never any motion practice. The parties worked that out, apparently, and the plaintiffs accepted a certain level of discovery and moved on. And so I think that to compare us to Sun is apples and at least oranges, if not something else, or Flint or these non-parties, these other non-parties. But to compare us to

Keurig's source code is really a bad comparison for a number of reasons. Keurig is the party whose and the accused anticompetitive conduct involves the source code. So I think it's wrong to say, "In fairness. because other parties have produced this or we, Keurig, have produced that, just make Microtrace roll over and give us everything we want." That's not the test under Rule 45. And I feel like Keurig in their papers in Minnesota and also here today, they skip right over the balance that has to be shown between relevance and substantial need for some of these documents. For example, the false-advertising claim, we learned about that in the hearing in Minnesota that that was one of the reasons they want this. Well, the truth or falsity of the statement has nothing to do with Microtrace. And the reasonableness of whatever alleged statement Keurig made, that has nothing to do with Microtrace because there's no nexus Keurig has between what it believed or thought or said and anything it new about Microtrace; there's just nothing there. So the idea that somehow they need to defense against a statement about their state of mind or evidence about their state of mind by getting into the most secret sauce of a non-party just doesn't make any sense. I need to make sure I said that.

The other thing that I wanted to mention -- and

we've heard it several times, we've seen it in their papers -- this idea of hacking something. I don't know if that's a term that's used, but to me "hack" has a pejorative connotation as though somehow Microtrace did something wrong by applying its expertise to the products in the market and reverse-engineering something. Reverse-engineering is part of the American way of life as long as you're not violating someone's intellectual property. And so this idea that we somehow did something wrong or that there's more to the Sun story than meets the eye, I think the Court needs to disregard that because there's no facts to support that.

And I guess the last thing I just wanted to say, Mr. Mukhi said at trial we may want to show this. Well, that -- well, I think the Court already gets our argument on that point about costs and margins. The fact that he said at trial we want to do X only heightens Microtrace's concern about its most secret information, because, as the Court knows, protective orders don't apply at trial in the main. In the main, trials are public. They can protect discovery, but they can't protect us at trial. And so that is another concern that we have regardless of whether the protective order's in place for other purposes.

So I think I've captured what I wanted to say in

response to Mr. Mukhi's points.

THE COURT: Just one clarification on the communications. So, Mr. Conneely, the communications that you haven't yet fully searched and produced about the ACT system remains a category that you would need to fill, search for and produce. I think the recording of direct communications between Microtrace and Keurig was the way that I had phrased it. But that is still stuff that you would need to do and that you're willing to do, is that correct, or --

MR. CONNEELY: Then I apologize, your Honor. I thought you were saying between us and -- you were saying between us and Keurig. And we've satisfied and produced everything as between Microtrace and Keurig and Microtrace and Sun Chemical. Those were the categories. But with regard to the larger issue, which is are we going to be asked to redo the discovery or duplicate the discovery that's already presumably been done with TreeHouse as far as TreeHouse's communications with Microtrace, we haven't searched anything in ACT for those, and we haven't prepared for production, of course, any emails between TreeHouse and Microtrace because of our point -- I'm sounding like a broken record -- they should get it from TreeHouse.

THE COURT: Right. Right. But what I understood you to be saying was that the ACT system may record something like a call on July 13, 2014, between Microtrace's project manager and someone from TreeHouse. Am I misunderstanding what the system might reflect?

MR. CONNEELY: No, you've got it right, your Honor. You've got it exactly right.

THE COURT: Okay. So --

MR. CONNEELY: And I think we were -- we're still prepared to produce from ACT the scope of discovery that corresponds to -- that relates to our correspondence with TreeHouse but not our internal work on behalf of TreeHouse.

THE COURT: Okay. I wasn't expanding it. I wasn't intending to expand it beyond what you've searched for and produced other than to, in the category of ACT, which it sounds like you had not yet looked for, for any recordings or other instances of direct communications between Microtrace and Keurig or Sun, correct?

MR. CONNEELY: Okay, now I feel like I've declarified the matter for the Court. So let me try one more time.

THE COURT: Okay.

MR. CONNEELY: Among the 65 documents are the sum and substance of every communication, every document we

have about Sun or Keurig. And those came out of the ACT system. We actually searched ACT and produced documents from ACT about those very limited contacts.

THE COURT: Okay. But you haven't searched ACT for communications between Microtrace and TreeHouse?

MR. CONNEELY: That's correct, your Honor.

THE COURT: Okay, but you're willing to do that?

MR. CONNEELY: Well, we are willing -- if the Court says that we should produce from our own files all communications between us and TreeHouse?

THE COURT: Yes.

MR. CONNEELY: We would include ACT in our search, just as we would in the outlook for the people involved.

THE COURT: Right. Well, but as you said, presumably, the emails would already be part of the parties' production -- I hope that they are. There's 2 million documents; I'm hoping that we've gotten everything there. But what I'm focused on is what might not be reflected in the parties' production, which is some recording of, whether it's a meeting or a phone conversation, between Microtrace and TreeHouse that's recorded in ACT but wouldn't have otherwise shown up in emails.

MR. CONNEELY: I understand. And we are willing to search that system if required to do so. But, of course, the caveat remains we don't think that we should have to provide, even from ACT, anything that's internal only to Microtrace.

THE COURT: Okay.

MR. CONNEELY: Meaning if it doesn't relate to a communication with TreeHouse or if it would threaten the disclosure of our secret information -- and I guess the other point I wanted to make in that regard, just to clarify for the Court -- and it's in the papers -- but the people at TreeHouse don't know how we did what we did exactly. They know that we successfully did it. And so we'd even have to protect even there -- if there's an ACT, some statement by a Microtrace person that would threaten divulging that, we would have to protect that, as well.

THE COURT: Well, that's why -- I understand -- that's why I was trying to fine it to evidence that would show the instances of the communication directly between TreeHouse -- between Microtrace and TreeHouse but excluding totally internal Microtrace communications, as has already been done.

MR. CONNEELY: Thank you.

THE COURT: Is that distinction -- is that

distinction one that can be made in the course of your search?

MR. CONNEELY: It is. It is.

THE COURT: Okay. But what I was intending was that that limitation would be consistent with the written -- what you've otherwise done with your searches.

Okay. And --

MR. MUKHI: Your Honor, if I could just clarify?

THE COURT: Yes, go ahead. Sure.

MR. MUKHI: Because there is some confusion about Microtrace's position. So what they have produced is -- it's actually 62 pages. It does not contain any -- and I think you finally discussed this with Mr. Conneely -- it does not contain any communications between Microtrace and TreeHouse, whether from ACT or emails. It also does not contain any internal communications or external, for that matter, from the email system. So what we've got is just ACT for Keurig and Sun. Mr. Conneely is saying it represent everything. I don't think he's done any email searches -- he can correct me if I'm wrong -- but I think all that was done was Keurig and Sun within ACT, nothing with respect to TreeHouse, nothing with respect to email, whether internal or external.

MR. CONNEELY: And respectfully, your Honor --

oh, sorry, I didn't mean to interrupt. Please go ahead.

MR. MUKHI: No, go ahead, Mr. Conneely.

MR. CONNEELY: That's incorrect. We did search email inside of Microtrace for any communications with Keurig or with Sun Chemical.

MR. MUKHI: Okay. We didn't get any emails, so I guess there was nothing responsive there. But, as I said, that's a helpful clarification. Thank you. So it sounds like just nothing's been done with respect to TreeHouse's communications or anything internal to Microtrace. I just wanted to make sure, and that was a helpful clarification from Mr. Conneely.

THE COURT: Okay. That's as I understand it. And so what I'm suggesting with respect to category No. 2 in Keurig's papers, the communications category that we've been discussing, what I'm asking is that Mr. Conneely and Microtrace search the ACT system for any direct communications between Microtrace and TreeHouse and produce any records of communications other than emails.

MR. MUKHI: And just to be clear, your Honor, is that category No. 1 in our three topics that Microtrace has worked for TreeHouse? I'm sorry there are a lot of topics.

THE COURT: Yes, so looking at the bottom, I

guess you could look at it as either part of one or as a variation of No. 2. So I was using it -- and so No. 2 is communications related to Keurig and Sun Chemical. And so maybe the -- arguably, that's better in category No. 1 because it relates to the scope of the work, but in any -- whether you put it in category No. 1 or you put it in category No. 2, the order will refer to the ACT system specifically. Is there any concern -- I think it's been referred to in the papers, but there's no concern about referring to the ACT system in the Court's order, is there?

MR. CONNEELY: No, your Honor. I think it's an off-the-shelf product, actually.

THE COURT: Okay. Okay. So -- all right. And then further on category No. 1, then, with respect to the work, where I think we've landed is that the clarification on this topic is that Microtrace will agree to search for and produce and prepare a witness to testify at a categorical level about the number of people who worked on the project, the number of steps it involved, the number of hours, how long it took, and the like, without being required to refer to the specific scientific or technical steps or machinations that it used as part of the process that it performed for TreeHouse. The parties obviously

know the specifics on this topic better than I do, and so I would encourage you before Mr. Broger's deposition to try to -- if there's any further clarification that needs to happen, to try to work that out ahead of time. If you need to call the Court during the deposition, that's fine; but it's less preferred because it slows everything down. So I would prefer if you need the Court's assistance in defining that or clarifying that topic any further, obviously, we will specify it in the Court's order; but if the parties need any further assistance, I'd encourage you to reach out before the deposition so that the deposition can go forward smoothly without having to take breaks and reach out to the Court.

And then as to category 3, as I think I said earlier, it sounds like Microtrace has fulfilled its obligation to provide the information about its invoices and payments and the summaries. And I don't think that Keurig has met -- or the Court finds that Keurig has not met its burden under Rule 45(d)(3)(A) to require Microtrace to produce anything further as to its internal margins, costs or other analyses of its profits with respect to the work that it performed for TreeHouse. So Microtrace will not be required to produce anything further as to category 3 as it's described on page 7 of

Keurig's Memorandum in Opposition.

Is there any further clarification that the parties request today?

MR. CONNEELY: For Microtrace, we have one, your Honor.

THE COURT: Sure.

MR. CONNEELY: So we had objected to reproducing emails between Microtrace and TreeHouse. And it sounds like, from the Court's order, we are not going to be obligated to do that at this time; we're only going to be obligated to search the ACT system for those kinds of direct communications?

THE COURT: Correct. And I'm glad you raised that because there was a point about that I wanted to make earlier. I'm not sure if this will ever -- if this would come up, but if there -- if -- what I would like to do is not preclude Keurig from coming back here and saying, "Well, either we know that there was this email that existed but TreeHouse hasn't been able to find it for whatever reason; you know, that custodian left before his or her emails were archived," and they make a specific narrow request for a particular email, I hope that you would be able to accommodate that. But you're correct that otherwise I am not asking Microtrace to reproduce across

the board its email communications between TreeHouse and Microtrace.

MR. CONNEELY: Thank you for that clarification, your Honor. And, of course, if that kind of situation came up, we would be happy to search for it if we have it.

THE COURT: Okay.

MR. MUKHI: Your Honor, just one clarification.

THE COURT: Sure.

MR. MUKHI: So I think, you know, one of the concerns I had articulated earlier is we don't know how complete the ACT system is. We haven't seen it yet. I take it, your Honor, in the ruling you just articulated that you're balancing Keurig's needs against the burden, of course. I would just ask if we could -- if the ruling could be without prejudice --

THE COURT: Yes.

MR. MUKHI: -- to any additional arguments if, you know, what we get is a very limited set. Obviously, we understand the Court's ruling and the intent of the ruling, but if it -- thank you, your Honor.

THE COURT: Yes, of course, without prejudice. And my hope would be that once you do see whatever Microtrace produces from the ACT system, that the parties can, you know, talk it through and negotiate it. But if

you're unable to resolve it, certainly Keurig can come back and request further relief on that point.

MR. CONNEELY: And I assume that's true for a non-party like Microtrace, too?

THE COURT: Yes.

MR. CONNEELY: We're not going to be precluded from that kind of issue-specific return if we need your help?

THE COURT: Yes. If they want to ask and you want to object, everybody is welcome.

MR. CONNEELY: You're very kind, your Honor.

THE COURT: All right, well, we will issue an order that incorporates what I -- the rulings that I just made. I know that you will come back to me if there are any clarifications that need to be made. And, like I said, leading up to the deposition if there's further assistance, if the parties get to loggerheads on even more specific questions or topics, it's much easier to deal with that before the deposition starts, and I'm happy to get back involved. Okay?

MR. MUKHI: Thank you very much, your Honor.

THE COURT: Okay.

MR. CONNEELY: Thank you, your Honor.

THE COURT: All right. Thank you, all. We're

adjourned for today.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, In re: Keurig Green Mountain Single-Serve Coffee Antitrust Litigation, Docket #14md2542, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Date: May 27, 2020